

February 3, 2005

VIA ELECTRONIC FILING

Marlene R. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 99-68, 96-98
Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92

Dear Ms. Dortch:

On behalf of Pac-West Telecomm, Inc. ("Pac-West"), US LEC Corp ("US LEC"), and RCN Telecom Services, Inc. ("RCN"), I am writing in response to the latest *ex parte* filings by Verizon and Qwest regarding the use of "virtual FX" or "virtual NXX" arrangements.¹

While it is comforting to see that Verizon now takes the position that virtual FX traffic is not subject to access charges,² Verizon also wants virtual FX traffic freed from all forms of intercarrier compensation. To Verizon, ISP-bound virtual FX traffic is not subject to intercarrier compensation under the *ISP Remand Order*, and non-ISP-bound virtual FX traffic is not subject to reciprocal compensation. Verizon is seeking to push all virtual FX traffic into a regulatory netherworld of zero compensation, a bill-and-keep arrangement where terminating carriers collect their costs from their own end users.

¹ See *ex parte* letter from Donna Epps, Verizon, to Marlene H. Dortch, Federal Communications Commission, CC Docket Nos. 99-68, 01-92, filed Jan. 28, 2005 ("Verizon Ex Parte"); *ex parte* letter from Melissa E. Newman, Qwest, to Marlene H. Dortch, FCC, CC Docket Nos. 99-68, 01-92, filed Jan. 27, 2005 ("Qwest ex parte"). See also *ex parte* letter from Richard M. Rindler, Swidler Berlin LLP, to Marlene H. Dortch, Federal Communications Commission, CC Docket Nos. 96-98, 99-68, 01-92, filed Jan. 19, 2005.

² Qwest continues to assert that access charges are owed for all interexchange traffic. Qwest *ex parte* at 7. This position is obviously not true since some interexchange traffic is considered local, such as calls within the Washington, D.C. metropolitan area.

In the beginning, Verizon called bill-and-keep arrangements “bilk-and-keep” and asserted that termination without compensation amounted to an unconstitutional taking.³ Since then, Verizon has become a proponent of bill-and-keep for all intercarrier compensation arrangements, and until it made its noisy departure in May 2004, Verizon was a member of the “Inter-carrier Compensation Forum,” which conditioned membership on passing the litmus test of allegiance to bill-and-keep as a bedrock principle. Verizon does not want to limit its own ability to provide virtual FX products,⁴ but it does not want to pay others to terminate traffic its customers originate either.

The problem with Verizon’s position in this docket is that it is not supported by the law. As Verizon has admitted, the vast majority of virtual FX traffic is ISP-bound.⁵ Inter-carrier compensation for ISP-bound traffic is now solely within the jurisdiction of the Commission and the terms for compensation are defined by the *ISP Remand Order*. As Pac-West, US LEC, and RCN have stated previously, the compensation regime in the *ISP Remand Order* applies to all ISP-bound traffic, including ISP-bound traffic using virtual FX arrangements. Several state commissions have considered this issue, and the vast majority of them agree with that position.⁶

Verizon’s argument clings to the view that the Commission limited the scope of the *ISP Remand Order* to only “local” ISP-bound traffic, or traffic that terminates at the ISP facilities

³ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Reply Comments of Bell Atlantic at 20 (May 30, 1996) (“The most blatant example of a plea for a government handout comes from those parties who urge the Commission to adopt a reciprocal compensation price of zero, which they euphemistically refer to as ‘bill and keep.’ A more appropriate name, however, would be ‘bilk and keep,’ since it will bilk the LECs’ customers out of their money in order to subsidize entry by the likes of AT&T, MCI, and TCG. As we demonstrated in our opening comments, a regulatorily mandated price of zero –by any name—would violate the Act, the Constitution, and sound economic principles.” (Emphasis in original.))

⁴ Verizon is actively marketing non-ISP virtual FX products in connection with its IP-enabled residential voice product, VoiceWing, on the grounds that they lower long distance costs. Verizon’s website materials, attached to this filing, state the following:

Want to cut down on the cost of a family member's calls to you? With a second phone number, you can take advantage of having a phone number in another calling area. Have two kids in college? Get a phone number in each of their calling areas so they can keep in touch without incurring the cost of a long distance call.

It is reasonable to conclude that Verizon can offer an interexchange product “without incurring the cost of a long distance call” because access charges are not owed to the circuit-switched carrier involved in the call.

⁵ Verizon December 16, 2004 ex parte at 2.

⁶ These states include, but are not limited to, Alabama, California, Connecticut, Florida, Illinois, Michigan, New Hampshire, Ohio, Oregon, Rhode Island, Texas, Wisconsin, and Washington. Verizon also claims to have the benefit of the majority on its side, but Verizon compares apples with oranges: Verizon refers to state commissions that have ruled on virtual NXX *voice* calls, not ISP-bound calls. Verizon ex parte at 6. Similarly, Qwest refers only to state commission decisions regarding non-ISP virtual NXX traffic. Qwest ex parte at 7.

located in the same local calling area as the calling party. In Verizon's view, there continues to be a distinction between "local" ISP-bound traffic, and non-local ISP-bound traffic. Verizon bases this position on two sentences from the Background section of the *ISP Remand Order* and dicta from the D.C. Circuit.

Verizon never addresses, however, the undisputable fact that the Commission abandoned the "local" designation for traffic subject to federally prescribed intercarrier compensation. "We...refrain from generically describing traffic as 'local' traffic because the term 'local,' not being a statutorily defined category, is particularly susceptible to varying meanings and, significantly, is not a term used in section 251(b)(5) or section 251(g)." *ISP Remand Order* ¶ 34. Further, "In the *Local Competition Order*, as in the subsequent *Declaratory Ruling*, use of the phrase 'local traffic' created unnecessary ambiguities, and we correct that mistake here." *Id.* at ¶ 46.

In other words, if there appears to be silence on whether non-local ISP-bound traffic is included within the scope of the *ISP Remand Order*, that is only because the Commission no longer thought the "local" designation was relevant to the issue. Instead, the issue is whether a particular type of traffic is included within section 251(g): "Central to our modified analysis is the recognition that 251(g) is properly viewed as a limitation on the scope of section 251(b)(5) and that ISP-bound traffic falls under one or more of the categories set forth in section 251(g)." *Id.* at ¶ 35. Because the Commission determined that ISP-bound traffic was information access traffic, and information access traffic fell within the scope of section 251(g), ISP-bound traffic was within section 251(g) and was not within section 251(b)(5). (This specific holding was rejected by the D.C. Circuit, but the Court refused to vacate the interim rules. The Commission has not yet reviewed the legality of the ISP-traffic intercarrier compensation regime on remand.)

Verizon also makes the argument that ruling that virtual FX ISP-bound traffic is compensable under the *ISP Remand Order* would create additional arbitrage opportunities at the expense of serving voice customers. Verizon *ex parte* at 6. The reason for this? Non-ISP-bound virtual FX traffic is not subject to reciprocal compensation, according to certain state commissions. *Id.* The simple solution to this "problem" is to make clear that non-ISP-bound virtual FX traffic is subject to reciprocal compensation, thereby making it a more attractive option for CLECs under Verizon's metric. Apart from that, to the extent there ever were any "arbitrage opportunities" in serving ISPs—through virtual FX arrangements or otherwise—they have come and gone: the compensation rate to terminate ISP-bound traffic is below cost and dial-up minutes have peaked.⁷

⁷ See *ex parte* letter from Richard M. Rindler, Swidler Berlin, LLP, to Marlene H. Dortch, FCC, WC Docket No. 03-171, filed Jan. 11, 2005. Further, the canard about "regulatory arbitrage" is clearly false: after SBC successfully persuaded the Commission that the sky was falling due to CLEC termination of ISP-bound traffic, and the Commission imposed termination rates for ISP-bound traffic significantly below reciprocal compensation rates, SBC waited *two years* to adopt the Commission's plan "to curtail a pressing problem" and "to remedy an exigent market problem." *ISP Remand Order* ¶¶ 76, 81. See SBC Communications, Inc., Annual Report 2002 (Mar. 14, 2003) ("To date, none of our wireline subsidiaries have opted into the transition plan.")

Thus, all ISP-bound traffic is subject to the intercarrier compensation regime established by the *ISP Remand Order* and Verizon's arguments to the contrary fail. Verizon's attempt to continue to shoehorn ISP-bound traffic into a local/non-local distinction simply ignores the plain language of the Commission in the *ISP Remand Order*.⁸ As Pac-West, US LEC, and RCN have stated before, the Commission should reject the ILECs' attempt to re-write both the Telecom Act and the *ISP Remand Order* in this docket. Virtual FX traffic to ISPs is subject to the terms of the FCC's interim rate plan, and non-ISP-bound virtual FX traffic should be compensated as local traffic under Section 251(b)(5).

Sincerely,

/s/

Richard M. Rindler
Michael W. Fleming

cc: Scott Bergmann
Matt Brill
Jeff Carlisle
Victoria Goldberg
Dan Gonzalez
Jane Jackson
Christopher Libertelli
Jennifer Manner
Steve Morris
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⁸ Despite Verizon's childish dismissal of the charge, Verizon's position here does contradict its position in previous proceedings. Before 2001, Verizon argued *ad nauseum* that calls to ISPs could not be considered "local" and subject to reciprocal compensation because they did not terminate at the ISP's facilities within the local calling area of the calling party. Now, however, Verizon insists that the only type of ISP-bound calls that are compensable are "local" calls. What makes them "local"? The physical presence of ISP facilities to terminate incoming calls within the local calling area of the calling party.